81-1026

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CASE NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES U. RUPPERT,

Petitioner,

-VS-

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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The Petitioner, James U. Ruppert respectfully prays that a Writ of Certiorari issue to review the Opinion of the State of Ohio Twelfth District Court of Appeals from which Decision the Ohio Supreme Court refused to review on October 21, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. When a defendant is tried by a three-judge panel under a statute providing that only if the accused is charged with an offense puhishable by death will he be tried by three judges and the death penalty is later found to be unconstitutional, the defendant is only properly tried by the presiding judge, the one originally assigned to the case, and where that judge finds the defendant not guilty, he may not be retried.

I N D E X

QUESTIONS PRESENTED FOR REVIEW..... 1

STATEMENT OF JURISDICTION..... 4

CONSTITUTIONAL PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 5

STATEMENT OF FACTS..... 6

REASONS FOR GRANTING WRIT..... 7

1. This Court should grant a Writ of Certiorari to review this decision since the defendant who was originally tried by a three-judge panel was tried under a statute in the State of Ohio providing for a three-judge panel only when the death penalty could be imposed. Since the death penalty could not be imposed constitutionally in Ohio the defendant was improperly tried and the only person with authority to try the defendant was the presiding Judge, Fred Cramer, who found the defendant not guilty by reason of insanity. Therefore, to re-try the defendant now would violate his Fifth Amendment protection against double jeopardy under the United States Constitution..... 7

APPENDIX

Memorandum Decision and Judgment Entry, dated June 26, 1981..... App. 1

Appeal from the Court of Appeals.. App. 9

AUTHORITIES

Bell vs. Ohio, 438 US 637..... 9

Lockett vs. Ohio, 428 US 586..... 9

Ohio Revised Code 2945.06..... 8

State vs. Thomas, 61 OS 2d 254..... 7

Constitution of the United States of America, Amendment V..... 4

STATEMENT OF JURISDICTION

The Ohio Supreme Court declined to hear this matter on October 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States of America, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant, James U. Ruppert, was indicted in 1975 for the murder of eleven (11) members of his family, and this Court is no doubt familiar with the surroundings of this case having once heard it previously on appeal. James U. Ruppert was convicted by a majority, i.e., two out of three, of a Three-Judge Panel, Judge Fred Cramer finding the defendant not guilty, the other two Judges finding the defendant guilty.

The case was appealed on the grounds that a majority verdict was not constitutional and contrary to the law of Ohio and furthermore that James U. Ruppert had been advised that it would take all three judges to convict him and was yet convicted by a majority of the Judges. The Court of Appeals reversed the conviction on the basis that James U. Ruppert had been misinformed on his Jury Waiver, which decision was affirmed by the Ohio Supreme Court and certiorari was denied by the United States Supreme Court. A new trial was ordered for the defendant. The defendant filed a Motion To Acquit based upon the grounds that to re-try him would constitute double jeopardy. The case was argued before visiting Judge A. Ross Siverling who denied the Motion To

Acquit the defendant. The Ohio State Twelfth District Court of Appeals affirmed this decision and the Ohio Supreme Court refused to hear said case. It is now urged that this Court should grant a Writ of Certiorari.

STATEMENT OF FACTS

James U. Ruppert was convicted by two out of three of a Three-Judge Panel. Judge Fred B. Cramer presided at the trial and because the Jury Waiver was signed, a three-judge panel was selected, composing of Judge Cramer, the presiding Judge, Judge Marrs, and Judge Fiehrer. Judge Cramer acquitted the defendant; however Judge Marrs and Judge Fiehrer found the defendant guilty.

REASONS FOR GRANTING WRIT

1. This Court should grant a Writ of Certiorari to review this decision since the defendant who was originally tried by a three-judge panel was tried under a statute in the State of Ohio providing for a three-judge panel only when the death penalty could be imposed. Since the death penalty could not be imposed constitutionally in Ohio the defendant was improperly tried and the only person with authority to try the defendant was the presiding Judge, Fred Cramer, who found the defendant not guilty by reason of insanity. Therefore, to re-try the defendant now would violate his Fifth Amendment protection against double jeopardy under the United States Constitution.

The defendant has appealed from the denial of the motion to Acquit on the grounds of double jeopardy. There can be no doubt that even though the defendant has not gone to trial yet for the second time, such an order is immediately appealable. In the case of State vs. Thomas, 61 OS 2d 254, the Supreme Court of Ohio held:

> "The overruling of a Motion to Dismiss on the grounds of double jeopardy is a final appealable order..."

The Court reasoned that it not only protects the accused from multiple prosecutions for the same offense, but it also protects the defendant from having to stand trial a second time, even if he is not punished. Therefore, there is no doubt that the order is immediately appealable. The question then is has James Ruppert been placed in double jeopardy. There are two propositions of law which are such plain law that no citations are needed. The first is that where the defendant appeals a conviction and obtains a reversal, he is not placed in double jeopardy by a subsequent trial. The second is likewise that where a defendant has been acquitted on a previous trial, he may not be retried. Thus the question becomes has James Ruppert been acquitted?

As the Court will remember, James Ruppert was convicted by two out of three of a three judge panel with the presiding Judge, the Judge to whom the case was originally assigned having found James Ruppert not guilty by reason of insanity. James Ruppert was tried by a three Judge panel by virtue of Ohio Revised Code 2945.06 which provides

that if the accused waives a jury if he is charged with an offense punishable by death, he will be tried by three judges, the three judges consisting of the presiding judge and two others appointed by the presiding judge. However, James Ruppert was not charged with aggravated murder with specifications for which the death penalty was available at the time. However, the United States Supreme Court, in Bell vs. Ohio 438 US 637, and Lockett vs. Ohio, 438 US 586, held that the death penalty was unconstitutional and that no one could be sentenced to death under that statute.

Thus, since James Ruppert was not charged with an offense punishable by death, he could not legally be tried by a three-judge panel, and Judge Cramer then had no authority to appoint a three-judge panel. If a Statute is unconstitutional it is void from its inception, and since the death penalty was unconstitutional, then it was void. Thus, the two judges who sat with Judge Cramer were mere surplusage and the only Judge who was properly sitting in the case, Fred

B. Cramer, found the defendant Not Guilty by reason of insanity. His decision was the only valid judgment and therefore the defendant has in effect been acquitted of the charge and been found Not Guilty by reason of insanity and therefore the State's attempt to try him is double jeopardy and the defendant should have been dismissed.

CONCLUSION

Therefore, petitioner James Ruppert submits to this Court that he has been acquitted of the charge and it was error for the Courts to refuse to grant his Motion To Acquit and Motion to Dismiss the defendant and the State is barred from re-trying him a second time and that this Court should grant Certiorari to determine this question.

Respectfully Submitted,

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and

By_____
Timothy R. Evans

APPENDIX

Filed in the Court of Appeals
Butler County, Ohio
June 26, 1981
Edward S. Robb, Jr.
Clerk

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

STATE OF OHIO, * Case No. CA80-04-0037
Plaintiff-Appellee
vs. * MEMORANDUM DECISION
JAMES U. RUPPERT * AND
JUDGMENT ENTRY
Defendant-Appellant 6-26-81
*
* * * * * * * * * * * *

John F. Holcomb, Butler County Prosecutor, Butler county Courthouse, Hamilton, OH 45011
Counsel for Plaintiff-Appellee

H. J. Bressler, Hugh D. Holbrock, Timothy R. Evans, Holbrock, Jonson, Bressler & Houser, 315 So. Monument Avenue, Hamilton, OH 45011

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries, original papers, transcript of the proceedings from the Court of Common Pleas

of Butler County, Ohio, and the brief and arguments of counsel.

Now, therefore, the assignment of error having been fully considered, is accordingly passed upon in conformity with App. R. (12) A as follows:

Defendant-appellant, James U. Ruppert, was indicted on April 4, 1975, for aggravated murder with specifications, in violation of R. C. 2903.01 (A) and 2929.04 (A) (5). He is alleged to have murdered his mother, brother, sister-in-law, and their eight children. To the indictments, pleas of not guilty and not guilty by reason of insanity were entered in his behalf. Preliminarily, he was found competent to stand trial. A written jury waiver was signed by appellant and entered into the court records; the waiver included a consent to be tried by three judges of the Common Pleas Court of Butler County, Ohio. Judge Cramer signed an Entry relative to that panel, to wit:

> The defendant herein having duly, and in accordance with law, waived his right to a trial by jury in this cause and having elected to be tried by a panel of three judges, I, as Presiding Judge of the Court of Common Pleas of Butler County, Ohio, do designate Arthur J. Fiehrer, Robert L. Marrs and myself as the three judges constituting said panel.

Nowhere does the record indicate that the cause had been assigned to Judge Cramer; the Entry merely acknowledges that Judge Cramer was the Presiding Judge and that, as such, the statutory duty to form the panel fell upon him.

Following the trial to the three-judge panel, Judge Fiehrer and Judge Marrs signed a majority verdict indicating that the state had proved beyond a reasonable doubt that appellant was guilty of aggravated murder, and that he was sane at the time of the commission of the offenses. Judge Cramer did not agree and would have found him not guilty by reason of insanity.

Appellant thereafter filed a Motion For a New Trial stating as one of the grounds that the jury waiver was not knowingly, intelligently, and voluntarily given because it was given upon the invalid premise that the verdict was required to be unanimous. The motion was overruled in the Common Pleas court, and appellant was sentenced to eleven consecutive life terms. Since the verdict of the panel was not unanimous, the death penalty was not imposed.

Notice of appeal was timely filed, and in due course, the appeal was

heard and decided in the First District Court of Appeals wherein the judgment was reversed. State vs. Ruppert No. CA75-08-0067 (1st Dist. August 3, 1978). The Ohio Supreme Court affirmed the court of appeals. State vs. Ruppert (1978), 54 Ohio St. 2d 263, 375 N.E. 2d 1250. The United States Supreme Court denied certiorari. The reversal was based upon invalidity of the jury waiver. At the same time, the appellate court, pursuant to another assignment of error, held that the judgment and conviction were not against the manifest weight of the evidence.

A new trial was ordered for Mr. Ruppert. A motion for change of venue was granted, and this cause is currently docketed in Hancock County, Findlay, Ohio, for trial, pending the outcome of this appeal.

The instant appeal was taken from the trial court's denial of appellant's motion for acquittal based upon a claim of double jeopardy. His single proposition of law is stated as follows:

> The Court erred in overruling the Defendant's Motion for Acquittal

for the reason that the Defendant has been found Not Guilty in a previous trial and therefore could not be retried.

The overruling of a Motion to Dismiss on the grounds of double jeopardy is a final appealable order. State v. Thomas (1980), 61 Ohio St. 2d 254, 400 N. E. 2d 897.

Appellant asserts that Judge Cramer was the only judge before whom appellant was validly tried. His claim is that Judge Cramer, as presiding judge, was the judge to whom the case was originally assigned. The record does not support that contention. Judge Cramer, as presiding judge, was following the dictates of R. C. 2945.06 in assembling a panel, and that is reflected in his Entry. His decision carried no more weight than did the decision of the other two judges. The fact is, appellant was improperly tried by the three-judge panel because there was no valid jury waiver. Surely, if one of the other two judges who found appellant guilty had been presiding judge at that time, appellant would not now attempt to argue that his decision was binding. No one person's decision carried more weight than the others. R. C. 2945.06 contemplates a majority vote. State vs.

Ruppert (1978), 54 Ohio St. 2d 263, 375 N. E. 2d 1250. Therefore, the only decision was the collective one.

The jurisdictional provisions of R. C. 2945.06 have never been repealed and remain valid. Although Lockett vs. Ohio (1978), 438 U.S. 586, 98 S. Ct. 2954 and Bell vs. Ohio (1978), 438 U.S. 637, 98 S. CT. 2977 held that Ohio's death penalty statutes were unconstitutional, those decisions only invalidated the portion of the judgment pertaining to the death penalty. Although those cases would void the portions of those statutes relative to imposition of the death penalty itself, as a penalty, it had no effect upon the remainder of this statute. Use of the three-judge panel has been upheld as constitutional. State vs. Cotton (1978), 56 Ohio St. 2d 8, 381 N. E. 2d 190.

However adeptly appellant attempts to obfuscate the issue, the essential element presented is whether there may be a retrial following reversal of a conviction on appeal. There is only one instance in which conviction will prevent a retrial; when a conviction is reversed on the weight or sufficiency of evidence, the

defendant must be discharged. Burks v. United States (1978), 437 U.S.1, 98 S. Ct. 2141

When a criminal's trial has been reversed in the Court of Appeals because of an invalid jury waiver, a retrial does not conflict with the constitutional rule against double jeopardy. Beatty v. Alston (1975), 43 Ohio St. 2d 126, 330 N.E. 2d 921; cert. denied 423 U.S. 1000, 96 S. Ct. 432; Foran v. Maxwell (1962), 1973 Ohio St.561, 184 N. E. 2d 398; Crim. R. 33(D).

Appellant's assignment of error is accordingly not well taken.

The assignment of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed, and remanded for further proceedings according to law.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

CASTLE, P.J., HENDRICKSON, KOEHLER, JJ.

To the Clerk:

Enter upon the journal of the Court, per Order of the Court.

By_____
Presiding Judge

THE SUPREME COURT OF OHIO

1981 Term

THE STATE OF OHIO, To wit: October 21, 1981

City of Columbus,

State of Ohio,
Appellee,
vs.
James U. Ruppert, No. 81-1513
Appellant APPEAL FROM THE COURT OF APPEALS
for Butler County

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists hereon.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that

the foregoing entry was correctly copied
from the Journal of this Court.

Witness my hand and the seal of the Court
this _____day of _____19____

_____Clerk

_____Deputy

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ALEXANDER L. STEVAS
CLERK

No. 81-1026

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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I

QUESTION PRESENTED

Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, does the retrial constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	3
Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, the retrial does not constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution.	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Bell v. *Ohio*, 438 U.S. 637 (1978)	7
Burks v. *United States*, 437 U.S. 1 (1978)	4-5
Grafton v. *United States*, 206 U.S. 333 (1907)	6
Lockett v. *Ohio*, 438 U.S. 586 (1978)	7
State v. *Cotton*, 56 Ohio St. 2d 8, 381 NE 2d 190 (1978)	7
State v. *Rose*, 89 Ohio St. 383, 106 NE 50 (1914)	6
State v. *Ruppert*, 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978)	4, 6, 7
Sutcliffe v. *State*, 18 Ohio 469 (1849)	4
United States v. *Ball*, 163 U.S. 662 (1896)	4, 5
United States v. *Scott*, 437 U.S. 82 (1978)	4
United States v. *Tateo*, 377 U.S. 463 (1964)	5

Statutes:

Ohio Revised Code Section 2945.06	2, 6, 7

No. 81-1026

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Respondent, State of Ohio, prays that a petition for a writ of certiorari herein be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for Butler County, Twelfth Appellate District of Ohio, is unreported and is appended to the petition at Appendix 1. The judgment entry of the Supreme Court of Ohio overruling Petitioner's motion for leave to appeal and dismissing said appeal are appended to the petition at Appendix 9.

The previous relevant decision of the Supreme Court of Ohio is reported at 54 Ohio St. 2d 263, 375 NE 2d 1250

(1978). This Court's memorandum decision denying certiorari is reported at 439 U.S. 954 (1978). (*Ohio* v. *Ruppert,* Case No. 78-254.)

STATEMENT OF THE CASE

James U. Ruppert was indicted by the April, 1975 session of the Butler County Grand Jury upon eleven counts of Aggravated Murder, in violation of Ohio Revised Code Section 2903.01 (A), with specifications contrary to Revised Code Section 2929.04 (A) (5), the eleven homicides occurring on Easter Sunday, March 30, 1975. On June 6, 1975, Ruppert entered a written waiver of jury trial, a three-judge court consisting of Butler County Common Pleas Judges Cramer, Fiehrer and Marrs was empaneled pursuant to Ohio Revised Code Section 2945.06, and on June 16, 1975, trial commenced with a reaffirmation of the jury waiver. On July 3, 1975, the Court's finding of guilty as charged to each of the eleven counts with specification was entered, a majority of the court so finding. On July 14, 1975, the judgment of conviction as to eleven consecutive terms of life imprisonment was imposed.

Subsequently, on August 22, 1975, a motion for new trial was heard and overruled on the issue, *inter alia,* whether the jury waiver was knowing, intelligent and voluntary. From such judgment, direct appeal was brought to the Court of Appeals, First Appellate District of Ohio, which held that the waiver of trial by jury was not knowingly, intelligently and voluntarily made; seven other assignments of error on appeal, including whether the evidence was sufficient to sustain the conviction as to eleven counts of aggravated murder, were overruled, and the Court of Appeals reversed and expressly remanded the cause for a new trial.

The Supreme Court of Ohio affirmed, 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978). The Supreme Court of the United States denied certiorari, 439 U.S. 954 (1978).

Pursuant to the mandate of the Court of Appeals, the cause was remanded for a new trial; Honorable A. Ross Siverling, sitting by assignment, granted a motion for change of venue and overruled a motion for an acquittal on the grounds of double jeopardy, entered on April 17, 1980. An appeal followed, and the Court of Appeals for Butler County affirmed the judgment of the trial court on June 26, 1981. The Supreme Court of Ohio denied a motion for leave to appeal on October 21, 1981.

The petition, filed in this Court on December 3, 1981, was received by Respondent by ordinary mail on December 28, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, the retrial does not constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution.

Petitioner Ruppert's successful appeal of the judgment of conviction was based solely on an error in the proceedings, with the Court of Appeals expressly holding the evidence at the first trial sufficient to support a verdict of guilt; as such, there is no bar to further prosecution on the same charges. Simply put, the reversal of the 1975 conviction was initiated by the Petitioner's motion for a new trial, grounded on the validity of his waiver of trial

by jury and election to be tried by a three-judge panel. The Court of Appeals and Supreme Court of Ohio expressly remanded the matter for a new trial solely on this ground. *State* v. *Ruppert,* 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978).

The principle that the Double Jeopardy Clause of the Ohio Bill of Rights, Ohio Const. Art. I § 10, does not preclude a retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of Ohio's constitutional jurisprudence, *Sutcliffe* v. *State,* 18 Ohio 469, 477-479 (1849). This principle is likewise firmly established in federal constitutional law under the Fifth Amendment's Double Jeopardy Clause, recognized in cases from *United States* v. *Ball,* 163 U.S. 662, 671-672 (1896), to *United States* v. *Scott,* 437 U.S. 82, 88-89 (1978).

Only one instance emerges in which an appellate reversal of a conviction will preclude a retrial; this is where an appellate court has determined that in a prior trial the evidence was insufficient to sustain a verdict of guilty. In *Burks* v. *United States,* 437 U.S. 1 (1978), the Supreme Court thoroughly discussed the history and purpose of the Double Jeopardy Clause, concluding that a reviewing court's reversal for insufficiency of the evidence should bar a subsequent prosecution. However, the Court distinguished evidentiary sufficiency from a reversal for trial error, which implies nothing as to the guilt or innocence of the defendant. Rather, such reversal for trial error "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15. Thus, the Court emphasized:

> We have no doubt that Ball was correct in allowing a new trial to rectify *trial error* . . . . 437 at 14 (emphasis per the Court).

In the case at bar, Ruppert's claim that he was deprived of his right to a trial by jury was sustained on appeal, the Court of Appeals noting that essential unfairness in the trial proceedings was demonstrated. Significantly, however, on Ruppert's eighth assignment of error, the Court of Appeals stated, "we cannot say that as a matter of law the evidence was insufficient to sustain the conviction . . . ." This cause therefore clearly demonstrates, in classic form, the principle that a retrial after reversal on grounds of trial error is not barred by the Double Jeopardy Clause.

The case most analogous is *United States* v. *Tateo,* 377 U.S. 463 (1964), cited with approval in *Burks,* where a defendant was induced to enter a guilty plea on the fourth day of a jury trial by comments of the trial judge and defense counsel that if convicted he would be given "the absolute maximum sentence," life imprisonment. In subsequent federal habeas corpus proceedings the guilty plea and conviction were set aside, the plea having been coerced and involuntary due to the trial judge's comments. The Supreme Court held that the case fell squarely within the reasoning of *Ball* and subsequent cases allowing retrial of persons whose convictions have been overruled for error in the proceedings, and advanced in justification of the policy of allowing retrial to correct trial error:

> It would be a high price indeed for society to pay where every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. Id. at 46..

As in *Tateo,* Ruppert's waiver of trial by jury was induced by comments of the trial judge and defense counsel,

and was therefore not a knowing, intelligent and voluntary waiver. The reversal was to correct this trial error *which voided the entire proceedings thereafter,* notwithstanding the same court's judgment that the state's evidence was sufficient for conviction. The Court of Appeals mandate, reversing and remanding with a direction of a new trial, was the just and proper disposition, and pursuant to this mandate Petitioner Ruppert should stand trial on the indictment for eleven counts of aggravated murder.

Again, it is a long-established rule in Ohio as well as federal jurisprudence that an accused can premise a claim of former jeopardy a prior court proceeding only if that court had jurisdiction to try him for the crime charged. *State* v. *Rose,* 89 Ohio St. 383, 386, 106 NE 50, 51 (1914); *Grafton* v. *United States,* 206 U.S. 333, 345 (1907). Petitioner, attempting Judge Cramer's dissenting panel vote as an "acquittal," ignores the basic logic that the entire proceedings after his jury waiver were held invalid because of Judge Cramer's misinformation. The proceedings before the three-judge panel having been invalid, jeopardy did not attach, especially where the accused himself sets in motion the proceedings which nullified the judgment.

It is clear that the dissenting vote of Judge Cramer had no effect whatsoever as an "acquittal." Section 2945.06 was held to be jurisdictional, *State* v. *Ruppert,* 54 Ohio St. 2d at 269; to obtain jurisdiction a three-judge panel or a single judge sitting without a jury must be invoked by a *valid* waiver of jury trial. As it was held that Ruppert's jury waiver was invalid, neither a three-judge nor a judge sitting without a jury could possess jurisdiction to decide questions of fact or law. Thus, the dissenting vote of Judge Cramer was a complete nullity.

Parenthetically, it is without doubt that if Ruppert had knowingly, intelligently and voluntarily waived a trial by

jury and invoked the three-judge panel, the conviction upon a majority vote of the panel have been upheld. *State* v. *Ruppert,* 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978), syllabus paragraph one. At the time of the offense and trial, Ruppert was indeed "*charged* with an offense punishable with death," and the provisions of Section 2945.06 of the Revised Code were applied to this case, as in many cases, including *Bell* v. *Ohio,* 438 U.S. 637 (1978). In the wake of *Bell* and *Lockett* v. *Ohio,* 438 U.S. 586 (1978), cases tried before three-judge panels were not reversed but were modified from death sentences to life imprisonment. *See, e.g., State* v. *Cotton,* 56 Ohio St. 2d 8, 381 NE 2d 190 (1978). Thus, the argument of counsel that *Lockett* and *Bell* rendered three judge panels unconstitutional is simply incorrect. *Lockett* and *Bell* declared unconstitutional only the *imposition* of a death sentence, leaving unaffected the matter of presentence trial procedure set forth in § 2945.06.

CONCLUSION

Because the decision of the Ohio court below is consistent with the applicable decisions of this Court, and no allegation is made in the petition for certiorari that there is a conflict between the decision in this case and any decision of another state court or a federal court of appeals, this Court should decline to review the instant case.

Petitioner Ruppert's application for certiorari should be denied.

Respectfully submitted,

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